IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0187
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
SHANNON JANE PARKS,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20054332

Honorable Howard Hantman, Judge

Affirmed

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Joseph L. Parkhurst
Tucson
Attorneys for Appellee

Robert J. Hooker, Pima County Public Defender
By Kristine Maish
Tucson
Attorneys for Appellant

E S P I N O S A, Judge.

¶1 After a jury trial, appellant Shannon Parks was convicted of aggravated driving under the influence of an intoxicant (DUI) on a suspended license, aggravated driving with an alcohol concentration of .08 or more on a suspended license, aggravated DUI with two or more prior DUI convictions, and aggravated driving with an alcohol concentration of .08 or more with two or more prior DUI convictions. On appeal, Parks argues the trial court erred in denying her pretrial motions to suppress evidence and requiring her former attorney to testify as a witness for the state. She also contends she was denied her constitutional right to a jury trial on the state's allegation that she had a prior conviction for sentencing enhancement purposes, there was insufficient evidence to prove the prior conviction, and the trial court violated her right to be represented by counsel of her choice. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 One night in October 2005, A. was looking out the front window of her home when she saw a vehicle speeding northbound toward a T-intersection at the end of the street. She watched the vehicle pass through the intersection, jump the curb, and crash into a wash. A young woman then exited the vehicle and began to run down A.'s street. A. ran out the front door of her home and asked the woman if she had been injured. The woman responded, "[What] are you looking at? What's your problem?" and continued to run away. A. walked to the vehicle, looked inside to ensure there were no other occupants, and called 9-1-1.

¶3 Tucson Police Officer Dominic Flores responded to the call. He observed two empty beer bottles and a half-empty bottle of liquor inside the vehicle. A. described the young woman as Hispanic, fifteen to sixteen years old, five feet two inches tall, 130 pounds, wearing a black dress shirt and blue jeans, and carrying her shoes in her hands. A records check showed the vehicle was registered to Parks at an address approximately ten houses south of where the accident occurred. Flores requested assistance and directed responding Tucson Police Officers, Dave Fernandez and James Kugler, to Parks's residence.

¶4 Kugler knocked on the front door of Parks's home while Fernandez went to the side of the house. Parks and another woman answered the door. Parks was in her bare feet, held a set of keys in her hand, and exhibited signs of intoxication, including slurred speech, watery and bloodshot eyes, noticeable sway in her stance, a flushed face, and a strong odor of intoxicants.[1] Her height, weight, and clothing substantially matched the description A. had given of the driver of the vehicle. Kugler informed Parks that he and Fernandez were investigating an accident, and he asked Fernandez to come to the front of the home. Upon seeing Fernandez, Parks became agitated and said she was going back inside; Kugler and Fernandez detained her.

¶5 Flores then drove A. to Parks's residence. Parks was standing near a patrol car in front of her home and was in handcuffs. Flores and A. remained in Flores's patrol car.

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[1]Fernandez later determined the keys in Parks's hand belonged to the vehicle in question.

Flores directed his patrol car's lights at Parks, and A. identified Parks as the woman who had fled the vehicle. Parks was taken to a police substation where testing of her blood established her blood alcohol concentration was .189. She was charged and convicted as outlined above and sentenced to four partially mitigated, concurrent prison terms of 3.5 years.[2] This appeal followed.

Motion to Suppress Out-of-Court Identification

¶6 Before trial, Parks filed a motion to suppress A.'s out-of-court identification of her, claiming it was the result of an unduly suggestive procedure and was unreliable. The trial court denied the motion. Parks now challenges the court's ruling, which we review for an abuse of discretion. *See State v. Barnes*, 215 Ariz. 279, ¶ 5, 159 P.3d 589, 590 (App. 2007).

¶7 Parks contends that because she was the only suspect A. had viewed and because she had been in handcuffs in front of a police car at the time A. identified her, the identification procedure was unduly suggestive.[3] She further claims the identification was unreliable because A. had observed the suspect only briefly and from the side as the person was running down the street; it had been night and there had been no streetlights;[4] and A. had

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[2]Parks was also initially charged with criminal damage, but on the first day of trial the court granted the state's motion to dismiss that charge with prejudice.

[3]Although Fernandez testified Parks had been in handcuffs at the time A. had identified her, A. testified that she had not noticed Parks was handcuffed.

[4]A. testified there had not been a streetlight at the intersection where the accident occurred but that a neighbor's flood light had illuminated the area.

initially described the suspect as a fifteen- to sixteen-year-old Hispanic female when Parks had been twenty-seven years old and is Anglo. She claims the court should have therefore suppressed A.'s identification of her as the driver of the vehicle.

¶8 We agree with Parks that the identification procedure used here, a "one-man show-up," was inherently suggestive. *See State v. Williams*, 144 Ariz. 433, 439, 698 P.2d 678, 684 (1985). An identification obtained from an inherently suggestive identification procedure is admissible, however, if it is reliable. *See id.* at 440, 698 P.2d at 685; *cf. State v. Hoskins*, 199 Ariz. 127, ¶ 35, 14 P.3d 997, 1008 (2000) (a show-up identification is not unduly suggestive if it is reliable). The factors for determining reliability include:

> (1) the witness' opportunity to observe the suspect at the time of the crime; (2) the witness' degree of attention at that time; (3) the accuracy of any prior description given by the witness; (4) the level of certainty at the confrontation; and (5) the length of time between the crime and the identification confrontation.

Williams, 144 Ariz. at 440, 698 P.2d at 685.

¶9 Although A. testified she had viewed the suspect only briefly, she had accurately described Parks's height, weight, and clothing before the identification procedure. And A. testified she had not had "any hesitation" or doubt in identifying Parks as the driver of the vehicle when she saw Parks at the residence shortly after the incident. Moreover, the identification took place a mere twenty minutes after the incident occurred. Although A. had initially described the suspect as fifteen to sixteen years old and Hispanic, the trial court noted that Parks was "very young looking," and the accuracy of the rest of A.'s physical

description, as well as the other relevant factors listed in *Williams*, show the identification was reliable. *See State v. Trujillo*, 120 Ariz. 527, 530, 587 P.2d 246, 249 (1978) (identification found reliable when witness gave otherwise accurate description of suspect prior to show-up identification but misidentified suspect's race). We therefore cannot say the court abused its discretion in finding the identification reliable and denying the motion to suppress the out-of-court identification. *See Barnes*, 215 Ariz. 279, ¶ 5, 159 P.3d at 590.

Motion to Suppress for Lack of Probable Cause to Arrest

¶10 Parks also challenges the trial court's denial of her pre-trial motion to suppress evidence based on lack of probable cause for her arrest. We again review the court's ruling for a clear abuse of discretion. *State v. Spears*, 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996).

¶11 Generally, a police officer may make a warrantless arrest if the officer has probable cause to believe the suspect has committed a felony. *See* A.R.S. § 13-3883(A). Probable cause is something less than proof beyond a reasonable doubt, yet more than mere suspicion that the suspect committed the offense. *State v. Aleman*, 210 Ariz. 232, ¶ 15, 109 P.3d 571, 576 (App. 2005). It arises when, based on all of the facts and circumstances at the time of the arrest, a reasonable person would believe the suspect committed the offense. *State v. Keener*, 206 Ariz. 29, ¶ 15, 75 P.3d 119, 122 (App. 2003).

¶12 Here, the officers clearly had probable cause to arrest Parks for DUI. Officers Fernandez and Kugler knew that a vehicle registered to Parks had been involved in an

accident. When Parks answered the door at her home, which was a short distance from the scene of the accident, she exhibited several signs of intoxication, and her clothing, height, and weight substantially matched the description A. had given of the driver of the vehicle. A. had also described the person as not wearing shoes and Parks had answered the door in her bare feet. These facts would have led a reasonable person to believe that Parks had committed DUI. *See Keener*, 206 Ariz. 29, ¶ 15, 75 P.3d at 122.

¶13 Parks claims "[t]he time frame from the initial police contact to the arrest was extremely brief, possibly as little as five seconds, not enough to form probable cause." Fernandez testified "[b]etween five seconds and a minute" had elapsed between his initial encounter with Parks and her arrest. Contrary to Parks's suggestion, a finding of probable cause to arrest her did not necessarily require a lengthy deliberation by the officers; it existed the moment they reasonably believed she had driven the vehicle in question while intoxicated. *See State v. Valle*, 196 Ariz. 324, ¶ 20, 996 P.2d 125, 131 (App. 2000). There is nothing to suggest that this belief would have taken any particular amount of time to formulate. Indeed, the officers could have immediately perceived that Parks matched A.'s description of the driver and appeared intoxicated. We therefore cannot say the court erred in finding probable cause existed for Parks's arrest and in denying her motion to suppress. *See Spears*, 184 Ariz. at 284, 908 P.2d at 1069.

New Counsel

¶14 At the conclusion of the hearing on both of Parks's motions and after the trial court denied both, Parks informed the court she would "like permission to seek new counsel" and would "like to be able to have the time and opportunity to do so." She stated that her attorney, who had been appointed by the court to represent her, had not informed her of her right to testify at the hearing and that she was "not comfortable proceeding at this point in time" with him as her counsel. The court questioned the timing of Parks's request and noted she had had previous opportunities to request new counsel and had not done so. Parks responded that she did not "know when it's okay to ask for new counsel." The court denied her request.

¶15 Parks claims the court violated her constitutional right to assistance of counsel because it denied her the opportunity to obtain private counsel of her choice. The state counters that Parks's request to the court was not for the opportunity to obtain private counsel but to have the court appoint her a new attorney, and it asserts the court properly denied her request. It is not entirely clear from the record whether Parks's request was for a continuance to permit her time to obtain private counsel or for the trial court to appoint her new counsel, but because she argues only the former on appeal, we address only that issue.

¶16 Generally, a defendant has the right to the assistance of counsel of his or her choice. *Robinson v. Hotham*, 211 Ariz. 165, ¶¶ 11-12, 118 P.3d 1129, 1132 (App. 2005). An indigent defendant, who, like Parks, is initially represented by court-appointed counsel,

has the right to later secure private counsel. *See id.* ¶ 16. When a defendant requests a continuance to obtain new counsel, a trial court has discretion to grant or deny the request because it is in the unique position to judge the inconvenience such a continuance would cause to the court, the litigants, and the witnesses, and whether "extraordinary circumstances" exist to warrant it. *State v. Hein*, 138 Ariz. 360, 368, 674 P.2d 1358, 1366 (1983); Ariz. R. Crim. P. 8.5.

¶17 Whether a trial court's denial of a request for a continuance violates a defendant's constitutional rights is determined from the circumstances of the particular case. *Hein*, 138 Ariz. at 369, 674 P.2d at 1367. Relevant factors include

> whether other continuances were granted; whether the defendant had other competent counsel prepared to try the case; the convenience or inconvenience to the litigants, counsel, witnesses, and the court; the length of the requested delay; the complexity of the case; and whether the requested delay was for legitimate reasons or was merely dilatory.

Id.; see also State v. West, 168 Ariz. 292, 296-97, 812 P.2d 1110, 1114-15 (App. 1991).

¶18 It does not appear that Parks had been granted other continuances or that the issues expected to arise at trial were particularly complex. However, there is no evidence or suggestion that Parks had competent counsel prepared to try her case. Indeed, the record indicates she had not yet even attempted to contact a private attorney. The trial court could have anticipated that a substantial delay in the proceedings would have been necessary for Parks to first contact an attorney and then for that attorney to prepare for trial. *See West*, 168 Ariz. at 297, 812 P.2d at 1115 (affirming trial court's denial of motion for continuance to

obtain new counsel when new counsel was unable to be prepared by trial date and other continuances had been granted).

¶19 Moreover, the court found Parks's request for a continuance was not well founded. When the court asked why she had not made her request sooner, Parks replied she had been considering it for a few days but had discovered only minutes before that she had a right to testify at the hearing.[5] The court stated it was "concern[ed]" with the "timing" of the request, which it found "suspect." The court evidently concluded that Parks had purposely withheld her request until it had ruled on her motions to suppress and that her request was a pretext for delaying the trial. We cannot say the court abused its discretion in assessing the situation and, accordingly, denying a continuance based on Parks's strategic desire to obtain new counsel. *See Hein*, 138 Ariz. at 368, 674 P.2d at 1366.

¶20 Parks, however, cites *United States v. Gonzalez-Lopez*, ___ U.S. ___, 126 S. Ct. 2557 (2006), in support of her argument that the court erred. In that case, the defendant had secured trial counsel but sought to replace that counsel with a second, out-of-state attorney. *Id.* at 2560. The trial court denied the second attorney's motion for admission *pro hac vice*, and a jury trial was held with another local attorney. *Id.* On appeal, the government conceded the trial court had erroneously deprived Gonzalez-Lopez of his right to counsel of choice, but argued that he was unable to show prejudice. *Id.* at ___, 126 S. Ct.

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[5]Just before Parks requested a continuance, Parks's mother had interrupted the hearing and informed the court that Parks had wanted to testify but that her attorney was "not listening."

at 2561. The Supreme Court held that, once a defendant's Sixth Amendment right to counsel of his or her choice is violated, no additional showing of prejudice is required, the defendant is entitled to reversal of his or her conviction, and the error qualifies as a "'structural error'" that is not subject to harmless error review. *Id.* at ___, 126 S. Ct. at 2564-65, *quoting Sullivan v. Louisiana*, 508 U.S. 275, 282, 113 S. Ct. 2078, 2083 (1993).

¶21 We find *Gonzalez-Lopez* inapplicable here. In this case, unlike *Gonzalez-Lopez*, the state has not conceded that the trial court violated Parks's right to counsel of choice. And, the court in *Gonzalez-Lopez* did not discuss, beyond the limited facts of that case, the circumstances that constitute a violation of the right to counsel; therefore, there is nothing in that case to suggest such a violation occurred here. Moreover, the court in *Gonzalez-Lopez* specifically "recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar." *Id.* at ___, 126 S. Ct. at 2565-66 (citations omitted). We cannot say the trial court here abused its discretion, and the "wide latitude" granted to it, in denying Parks's request for a continuance. *Id.*

Testimony of Former Counsel

¶22 On the fourth day of trial, the state subpoenaed Geri Hale, who had been Parks's defense counsel in a previous case. The state sought Hale's testimony to prove one of Parks's prior DUI convictions as alleged in counts three and four of the indictment. Over Parks's objection that Hale's testimony would violate the attorney-client privilege in

connection with Hale's prior representation of her and would violate several rules of professional conduct, the court required Hale to testify.

¶23 Hale's testimony was brief. The prosecutor handed her a plea agreement and minute entries from a January 2002 case in which Parks had allegedly pleaded guilty to misdemeanor DUI. Hale stated: "I don't remember this case, but I do recognize my signature [on the plea agreement]." The prosecutor asked Hale if she had been the attorney of record in the matter, and Hale replied: "Yes, it looks like I was the attorney of record." Defense counsel then asked Hale if she remembered Parks, what Parks looked like, or any details of the 2002 case. To each of these questions, Hale answered: "No, I do not." On redirect examination, the prosecutor asked Hale if she had "any personal knowledge or personal recollection of representing [Parks in 2002]." Hale answered that she did not. Parks argues on appeal that the trial court erred by requiring Hale to testify and in so doing violated the attorney-client privilege, her Sixth Amendment right to an attorney with undivided loyalty, and ER 1.8, ER 1.9, and ER 3.8, Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42.

¶24 We recognize the importance of the issue raised by the court's decision and that Parks's right to effectively cross-examine Hale could have been compromised by Hale and Parks's trial counsel being members of the same public law firm. We need not, however,

resolve the question whether any of Parks's Sixth Amendment rights were violated.[6] During her testimony, Hale did not identify Parks or connect her to the prior case, but merely identified her own signature on a document she was shown. Hale's testimony did not assist the state in proving that Parks was in fact the person convicted of misdemeanor DUI in 2002. Therefore, even if any error occurred in requiring Hale to testify, it did not prejudice Parks and was harmless.[7] *See State v. Eggers*, 215 Ariz. 472, ¶ 49, 160 P.3d 1230, 1246 (App. 2007) (error is harmless if it can be said, beyond a reasonable doubt, that it did not contribute to or affect the jury's verdict).

Sufficiency of Evidence for Prior Conviction

¶25 Following the jury trial on the charged offenses, the court conducted a bench trial on the state's allegation that Parks had a prior felony conviction. The court took judicial notice of its own superior court file for cause number CR-20020362, in which Parks had been convicted of felony endangerment. Without objection, the state offered and the court admitted into evidence a redacted, certified copy of Parks's conviction in CR-20020362 as well as Parks's driving record from the Motor Vehicle Department. The court found the state had sufficiently proved Parks's prior felony conviction.

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[6]We note that no attorney-client confidences were sought by the state or disclosed by Hale, *see State v. Alexander*, 108 Ariz. 556, 568, 503 P.2d 777, 789 (1972), and the ethical rules Parks cites, while applicable to the conduct of attorneys, do not govern a trial court's rulings. *See* Preamble to ER's, Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42.

[7]Contrary to Parks's assertion, any error committed by the court was not structural. *See State v. Ring*, 204 Ariz. 534, ¶ 46, 65 P.3d 915, 933-34 (2003).

¶26 Parks contends the prior conviction was not sufficiently established because "[the state] failed to prove that [she] was the person to whom the [2002 record of conviction] referred." She points out that the state had attempted to match her fingerprints to those from the 2002 conviction but the results had been inconclusive. And, she maintains, during the jury trial, although the state had called Hale to testify to prove Parks had been the person convicted in CR-20020362, Hale had failed to identify her.

¶27 The preferred method for the state to prove a prior conviction is to offer into evidence a certified copy of the prior conviction bearing the defendant's fingerprints. *State v. Robles*, 213 Ariz. 268, ¶ 16, 141 P.3d 748, 753 (App. 2006). Fingerprints, however, are not the only means of identifying the defendant as the person previously convicted of a felony, and courts may consider other kinds of evidence. *Id.* Here, both the certified copy of Parks's prior conviction and Parks's driving record listed Parks's birth date and contained her signature. The birth date and the signature were the same on each document. Moreover, the driving record contained a photograph of Parks. The court could reasonably find that the driving record was hers and, thus, that she was the person convicted in CR-20020362.

Jury Trial to Establish Prior Conviction

¶28 Finally, Parks argues she was entitled to have a jury, not the court, determine whether she previously had been convicted of a felony, as the state had alleged for sentence enhancement purposes. We have repeatedly held, however, that prior convictions for purposes of sentence enhancement need not be found by a jury. *See Robles*, 213 Ariz. 268,

¶ 19, 141 P.3d at 754; *State v. Keith*, 211 Ariz. 436, ¶¶ 2-3, 122 P.3d 229, 229-30 (App. 2005); *Newkirk v. Nothwehr*, 210 Ariz. 601, ¶¶ 5-14, 115 P.3d 1264, 1266-67 (App. 2005). We therefore reject this claim summarily.

Disposition

¶29 Parks's convictions and sentences are affirmed.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge